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Supreme Court U.S.
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In The

Supreme Court of the United States

PETER CLAYTON McCLENDON,

Petitioner,

versus

CITY OF COLUMBIA and JAMES R. CARNEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

JON MARK WEATHERS
Counsel of Record

SANDRA MOHLER
BRYAN, NELSON, RANDOLPH, AND WEATHERS, P.A.
Post Office Drawer 18109
Hattiesburg, Mississippi 39404
(601) 261-4100

Attorneys for Respondent James R. Carney

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REASONS FOR DENYING THE WRIT 1

I. That the Fifth Circuit found no violation of McClendon's substantive due process rights under a state-created danger theory of liability does not conflict with any relevant decision of this Court 1

II. As the law regarding state-created dangers and denial of due process was not clearly established in July of 1993, the Fifth Circuit's affirmance of summary judgment on qualified immunity grounds does not conflict with any relevant decision of this Court 6

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987).....7, 8

Carlisle v. United States, 517 U.S. 416 (1996) 2

Collins v. Harker Heights, 503 U.S. 115 (1992).....2, 4, 5

Conn v. Gabbert, 526 U.S. 286 (1999)..... 7

County of Sacramento v. Lewis, 523 U.S. 833 (1998)..4, 5, 6

Daniels v. Williams, 474 U.S. 327 (1986) 5

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989).....*passim*

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 7

Hope v. Pelzer, 122 S. Ct. 2508 (2002) 9

Johnson v. Dallas Indep. School Dist., 38 F.3d 198 (5th Cir. 1994), *cert. denied*, 514 U.S. 1017 (1995)..... 7

Malley v. Briggs, 475 U.S. 335 (1986) 8

Piotrowski v. City of Houston, 237 F.3d 567 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 53 (2001) 7

Randolph v. Cervantes, 130 F.3d 727 (5th Cir. 1997), *cert. denied*, 525 U.S. 822 (1998) 7

Salas v. Carpenter, 980 F.2d 299 (5th Cir. 1992).....7, 8

Saucier v. Katz, 533 U.S. 194 (2001) 7, 8

United States v. Lanier, 520 U.S. 259 (1997).....4, 9

Wilson v. Layne, 526 U.S. 603 (1999).....8, 9

REASONS FOR DENYING THE WRIT

I. That the Fifth Circuit found no violation of McClendon's substantive due process rights under a state-created danger theory of liability does not conflict with any relevant decision of this Court.

As to Peter McClendon's claims that by providing Loftin with a handgun, Detective Carney "created a serious danger" that "caused Peter McClendon harm and violated McClendon's due process rights," in its *en banc* opinion, the Fifth Circuit affirmed the district court's summary judgment in favor of Detective Carney on qualified immunity grounds:

> Because under the facts established by the summary judgment record,[1] viewed in the light most favorable to McClendon, there is no constitutional violation, we find that Detective Carney is entitled to qualified immunity. We further find, in the alternative, that even if those facts did establish a constitutional violation under current law, Detective Carney is nonetheless entitled to qualified immunity because his conduct was not objectively unreasonable in light of the law that was clearly established at the time of his actions.

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[1] Petitioner states that Loftin was "known to be involved with gangs and drugs" (Pet. i, 2.) and that he was "well known to the police as having a history of intoxication and involvement with gangs." Pet. 3(a). The summary judgment record shows that Loftin had no criminal history and that Carney knew about McClendon's threats against Loftin but was not aware that Loftin had "any violent intentions" toward McClendon. Pet. App. 17, 100-101.

Pet. App. 2. That the Fifth Circuit found no violation of McClendon's substantive due process rights under a state-created danger theory of liability in no way conflicts with any relevant decision of this Court.

Even though it is from dictum in *DeShaney v. Winnebago County Dep't of Social Services* that the state-created danger theory of liability for violation of substantive due process rights derives,[2] *DeShaney* is not a state-created danger case. It does explain the one exception to the general rule that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."[3] According to the *DeShaney* Court, the purpose of the Due Process Clause "[is] to protect the people from the State, not to ensure

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[2] "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 201 (1989).

[3] *DeShaney*, 489 U.S. at 197. There is "nothing in the language of the Due Process Clause itself [that] requires the State to protect the life, liberty and property of its citizens against invasion by private actors. . . . It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." *Id.* at 195. This Court has described its general reluctance "to expand the concept of substantive due process" and acknowledged the requirement of "judicial self-restraint" that it exercise "utmost care" when asked "to break new ground in this field." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992); *see also Carlisle v. United States*, 517 U.S. 416, 429 (1996) (declining to "fashion a new due process right out of thin air" when petitioner offered no "historical, textual, or controlling precedential support").

that the State protect[s] them from each other."[4] If, however, the State imposes a limitation on an individual's "freedom to act on his own behalf," the duty to protect arises:

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the 'deprivation of liberty' triggering the protections of the Due Process Clause.

489 U.S. at 200.

Taken in context, references in *DeShaney* to the requirement of custody for the State to have an affirmative duty to protect surround the language often quoted as support for the contention that the state-created danger theory provides another exception to the general rule. The "state-created danger" language is preceded by the concession that "the harms Joshua suffered occurred not while he was in the State's custody, but while he was in the custody of his natural father." 489 U.S. at 201. It is followed by the observation that "[while] the State once took temporary custody of Joshua [this] does not alter the analysis." *Id.* It is distinguished by circumstances under which the duty to protect may have arisen: "Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently

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[4] *DeShaney*, 489 U.S. at 196.

analogous to incarceration or institutionalization to give rise to an affirmative duty to protect." *Id.* at n.9.

That the "state-created danger" language in *DeShaney* should be considered only in the broader context of the custody exception rather than being narrowly construed as a second exception by implication is consistent with the discussion in *Collins v. Harker Heights*, 503 U.S. 115 (1992) and *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) and the references to *DeShaney* in those cases.[5]

In *Collins v. Harker Heights*, the plaintiff's constitutional claim was based solely on the Due Process Clause of the Fourteenth Amendment. Her husband, a city sanitation department employee, had died of asphyxia after he entered a manhole to unstop a sewer line. In addressing her claim that the defendant had violated "a federal constitutional obligation to provide its employees with certain minimal levels of safety and security",[6] the Court distinguished the claim from those "advanced by plaintiffs in several . . . prior cases who argued that the State owes a duty to take care of those who have already been deprived of their liberty."[7] Referring to *DeShaney* for the

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[5] In *United States v. Lanier*, 520 U.S. 259 (1997), the Court refers to a limited exception to the custody requirement: "[A]lthough *DeShaney* . . . generally limits the constitutional duty of officials to protect against assault by private parties to cases where the victim is in custody, *DeShaney* does not hold . . . that there is no constitutional right to be free from assault **committed by state officials themselves** outside of a custodial setting." 520 U.S. 259, 272 n.7 (emphasis added). Carney was not present at the chance encounter between McClendon and Loftin when the assault occurred. Pet. App. 11, 17.

[6] 503 U.S. 115, 127 (1992).

[7] *Id.*

proposition that "the 'process' that the Constitution guarantees in connection with any deprivation of liberty . . . includes a continuing obligation to satisfy certain minimal custodial standards",[8] the Court analogized the claim "to a fairly typical state-law tort claim"[9] and affirmed dismissal.

County of Sacramento v. Lewis also involved a claim of violation of substantive due process rights, this time as the result of a motorcycle passenger's having been killed in a high-speed police chase of the motorcycle. The death occurred when the deputy's vehicle skidded into the passenger after he was thrown from the motorcycle. In deciding that the plaintiffs' allegations were not sufficient to state a substantive due process violation,[10] the Court again referred to its reluctance to expand substantive due process[11] and to the *DeShaney* requirement of the State's restraint of an individual's liberty for imposition upon the State of " 'a corresponding duty to assume some responsibility for his safety and general well-being.' "[12]

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[8] 503 U.S. at 127-28 (emphasis added).

[9] *Id.* at 128 (also quoting *Daniels v. Williams*, 474 U.S. 327, 332 (1986) ("[T]he Due Process Clause 'does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.' ")).

[10] 523 U.S. 833, 842 (1998).

[11] *Id.*

[12] *Id.* at 851 (quoting *DeShaney*, 489 U.S. at 199-200). The Court also reiterated its holdings that "the Constitution does not guarantee due care on the part of state officials" and that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." 523 U.S. at 849 (citing *Daniels v. Williams*, 474 U.S. at 328). In this case, the Fifth Circuit described Carney's providing Loftin with a gun as being "certainly inadvisable," but concluded that Carney had not "acted with any level of culpability beyond mere negligence."

(Continued on following page)

The "restraint on liberty" exception set out in *DeShaney* does not apply in this case to subject Detective Carney to liability for the injury suffered by Peter McClendon at the hands of Kelvin Loftin. Had Carney acted to restrain McClendon's "freedom to act on his own behalf," the Due Process Clause may have been "triggered" and may have imposed a duty upon Detective Carney "to assume some responsibility for [McClendon's] safety and general well-being."[13] Because McClendon's freedom was not so restrained, under the *DeShaney* rule, he has not stated a viable constitutional claim against Carney for injuries inflicted by Loftin, a private actor. Carney is, as the Fifth Circuit held, entitled to qualified immunity; its decision does not conflict with *DeShaney*, and review by this Court is unwarranted.

II. As the law regarding state-created dangers and denial of due process was not clearly established in July of 1993, the Fifth Circuit's affirmance of summary judgment on qualified immunity grounds does not conflict with any relevant decision of this Court.

When the plaintiff has failed to establish a constitutionally-protected right, "there is no necessity for further

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Pet. App. 17. *See also Lewis*, 523 U.S. at 862 (Scalia, J., concurring in the judgment) ("Though . . . 'deliberate indifference' . . . may violate substantive due process, it is not the deliberate indifference alone that is the 'deprivation.' Rather, it is that combined with 'the State's affirmative act of restraining the individual's freedom to act on his own behalf.'" (quoting *DeShaney*, 489 U.S. at 200)).

[13] *DeShaney*, 489 U.S. at 200.

inquiries concerning qualified immunity",[14] including "whether that right was clearly established at the time of the alleged violation."[15] However, Detective Carney's entitlement to qualified immunity from McClendon's substantive due process claims does not result just from the lack of viability of the state-created danger theory. Even if the theory were now a viable exception to the *DeShaney* rule, the law regarding state-created dangers and denial of due process was not clearly established in July of 1993 when the challenged actions of Carney occurred.

If the law was not clearly established in July of 1993, Carney "could not . . . fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).[16] Following *DeShaney*, but prior to the events upon which McClendon's claims against Carney are based, *Salas v. Carpenter*[17] was the only case in which the Fifth Circuit had even considered the state-created danger theory.[18] While the *Salas*

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[14] *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The Court has denied petitions for review in three Fifth Circuit decisions involving the state-created danger theory: *Piotrowski v. City of Houston*, 237 F.3d 567 (5th Cir. 2001) (reversing judgment for plaintiff), *cert. denied*, 122 S. Ct. 53 (2001); *Randolph v. Cervantes*, 130 F.3d 727 (5th Cir. 1997) (affirming summary judgment for officials), *cert. denied*, 525 U.S. 822 (1998); *Johnson v. Dallas Indep. School Dist.*, 38 F.3d 198 (5th Cir. 1994) (affirming dismissal), *cert. denied*, 514 U.S. 1017 (1995).

[15] *Conn v. Gabbert*, 526 U.S. 286, 290 (1999).

[16] *See also Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.").

[17] 980 F.2d 299 (5th Cir. 1992).

[18] The *Salas* court held that the plaintiffs had failed to state a constitutional claim and that the defendant was "otherwise entitled to qualified immunity." 980 F.2d 299, 310 (5th Cir. 1992).

court referenced a number of the same decisions reviewed by the *en banc* court[19] and recognized that "[c]ourts have found a denial of due process when the state creates the faced dangers," not only was it "not persuaded that the contours of the law in this area were well defined in August of 1989"[20] it also acknowledged that in December of 1992 the law regarding state-created dangers and denial of due process was still uncertain: "Even today, [r]easonable officials may disagree over when a duty to protect private citizens arises."[21]

In determining whether a right was clearly established at the time of the challenged conduct, it is not enough that a "general proposition" – such as the right to due process protected by the Fourteenth Amendment – is without doubt clearly established: "The relevant, dispositive inquiry" is whether the right the defendant claiming qualified immunity is charged with violating was clearly established in a "'particularized . . . sense'"[22] so that he was "put . . . on notice that his conduct would be clearly unlawful." *Saucier v. Katz,* 533 U.S. 194, 202 (2001).[23]

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[19] *Salas,* 980 F.2d at 309, 311. Pet. App. 27-30.

[20] *Salas,* 980 F.2d at 309, 310-11.

[21] *Id.* at 310. *See also Malley v. Briggs,* 475 U.S. 335, 341 (1986) ("[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized."); *Wilson v. Layne,* 526 U.S. 603, 618 (1999) ("If judges . . . disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.").

[22] *Saucier v. Katz,* 533 U.S. at 202 (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)).

[23] Judged "in the light of pre-existing law the unlawfulness must be apparent." *Anderson,* 483 U.S. at 640, *quoted in Wilson v. Layne,* 526 U.S. 603, 615 (1999).

The degree of factual particularity required for the right allegedly violated to be deemed clearly established depends upon the circumstances: "In some circumstances . . . , a very high degree of prior factual particularity may be necessary."[24] In other circumstances, an official "can still be on notice that [his] conduct violates established law even in novel factual circumstances."[25] Whatever the required degree of factual particularity, the "salient question" in this case is whether the state of the law in July of 1993 gave Detective Carney "fair warning" that his loaning to Loftin the gun that Loftin used to injure McClendon was violative of McClendon's substantive due process rights.[26]

To answer this question, the Fifth Circuit did as suggested in *Wilson v. Layne,* 526 U.S. 603 (1999),[27] and reviewed cases from several of the six circuits that had "sanctioned some version of the state-created danger theory."[28] The Fifth Circuit based its affirmance of summary judgment in Detective Carney's favor on the qualified immunity issue on its conclusion that the "contours of

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[24] *United States v. Lanier,* 520 U.S. 259, 271 (1997) (equating "the clearly established immunity standard" with "the fair warning standard").

[25] *Hope v. Pelzer,* 122 S. Ct. 2508, 2516 (2002).

[26] *Hope v. Pelzer,* 122 S. Ct. at 2515-16 (citing *United States v. Lanier,* 520 U.S. 259 (1997) ("explaining that the 'fair warning' requirement is identical under § 242 and the qualified immunity standard")).

[27] "Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Id.* at 617.

[28] Pet. App. 25, 27.

an individual's right to be free from state-created danger" were not established by a "consensus" of circuits "with sufficient clarity to provide Detective Carney with fair warning that his conduct violated that right."[29] Accordingly, the Fifth Circuit's decision on this issue fully comports with the relevant decisions of this Court, and McClendon's petition for a writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, James R. Carney respectfully requests that this Court deny Petitioner Peter Clayton McClendon's petition for a writ of certiorari.

Respectfully submitted,

JON MARK WEATHERS
Counsel of Record

SANDRA MOHLER
BRYAN, NELSON, RANDOLPH,
AND WEATHERS, P.A.
Post Office Drawer 18109
Hattiesburg, Mississippi 39404
(601) 261-4100

Attorneys for Respondent
James R. Carney

[29] Pet. App. 30.